This chapter examines several issues raised by the extensive use of DNA tests and databases in advancing public safety. The examination draws on a communitarian perspective that balances the common good with individual rights rather than presuming that rights routinely trump the common good.

Specifically, the chapter examines major arguments made by critics who oppose extensive usages of DNA tests and especially the retention of results (or the samples from which the results were drawn) in databases for law enforcement purposes. (To save breath I shall refer to “DNA usages” from here on.) Most of the criticisms come from civil libertarians. Although none seem to completely oppose DNA usages, all demand that the state be greatly limited in conducting DNA testing, in storing the results, and in drawing on them. The critics’ basic approach is to combine a general distrust of the government with a strong commitment to the value of being let alone.

The chapter opens with a response to the challenge that DNA usages will usher in eugenics, because this claim is so detrimental that until it is set aside, there is little point to dealing with other criticisms. The chapter then turns to assessing the extent to which DNA usages serve the common good and to evaluating claims that numerous DNA usages violate the Fourth Amendment, violate privacy, and contribute to the development of a surveillance state. In the last section, the chapter analyzes the question of what kinds of DNA material (if any) should be kept in DNA banks and whether inmates should be granted a new right: to be tested.

The Threat of Eugenics

The most severe criticism hurled at DNA usages is that they will lead to Nazi-like policies whereby people will be killed or discriminated against based on their genes.
For instance, Barry Steinhardt, associate director of the American Civil Liberties Union, stated before the House Judiciary Committee's Subcommittee on Crime, "It is worth recalling that there is a long unfortunate history of despicable behavior by governments toward people whose genetic composition has been considered 'abnormal' under the prevailing societal standards of the day."¹ And the National Research Council's report DNA Technology in Forensic Sciences raised the same issue in reference to an earlier America: "The eugenics movement in this country . . . resulted in thousands of involuntary sterilizations."² (Steinhardt makes a similar argument chapter 9.)

In response, one notes first that the availability of DNA tests and banks did not cause the rise of totalitarian regimes or their introduction of eugenics, as is evident from the fact that the Nazis implemented such policies on a very large scale before DNA tests existed. The same holds for whatever eugenics policies have been introduced by other governments, including that of the United States. Nor are there any signs that totalitarian tendencies or interest in eugenics has increased in those democratic societies that have introduced DNA testing. To put it more sharply but not less accurately, to date, government policies rooted in eugenics have existed only before the development of scientific DNA testing—and not since.

True, as new biotech procedures and databases are further developed, they will make it easier for a future government to abuse these tools. But the same holds for many new scientific and technological developments, including most, if not all, modes of communication and transportation. It makes little sense to forgo or severely limit the use of a new device that yields major benefits out of a fear that someday some government may abuse it. To suppress DNA usages because they might become instead abuses is akin to arguing that we should not allow the building of rapid trains because they might be used to transport victims to concentration camps or should refrain from developing computers because Big Brother might benefit from them. This last analogy is particularly apt, because such objections were raised in the early days of computers by some of the same groups that now object to DNA usages, using rather similar arguments. (One may say that critics do not oppose all DNA usages, and hence the analogies do not apply. Fair enough. Let's just say that critics advocate so many limits on DNA usages that it is limiting the trains' speed to ten miles per hour.)

Second, a government that would introduce policies founded in eugenics is likely to inflict numerous other abuses on its people. This is what has invariably
in the past. In the United States, laws discriminating against women, racial and ethnic minorities, and gay people have roots in eugenics, and the society has been at least a bit authoritarian in implementing them. The best protection against the abuse of DNA tests and other basically beneficial products and devices is to work to ensure that the institutions and values that undergird free societies are strong and to defend them vigorously.

In addition, civil libertarians ignore the fact that DNA tests can help ward off totalitarianism. Totalitarian governments arise in response to breakdowns in the social order, when basic human needs, especially public safety, are grossly neglected. When a society does not take steps to prevent major social ills and to strengthen social order, an increasing number of citizens demand strong-armed authorities to restore law and order. By greatly helping to sustain law and order, DNA tests and banks play a significant role in curbing the type of breakdown in social order that can lead to totalitarianism.

Individual Rights and the Common Good: Libertarian versus Communitarian

Civil libertarians often take the position in reference to DNA databases, as they do in reference to most other law enforcement techniques, that individual rights must be vigorously protected. They state that they do not in principle oppose considerations of the common good, especially public safety, but given their great distrust of the government, they demand that all such considerations be carefully scrutinized. Public-safety procedures are presumed to be guilty (of abuse by government) until proven otherwise, and the standard of proof is set very high.³

The approach followed in this chapter, which relies on responsive communitarian thinking,⁴ treats individual rights and the common good as two profound, legitimate moral claims and seeks to work out a carefully crafted balance between the two. When possible, as it is to some extent in the case of DNA, as I will show shortly, both claims should be satisfied. And when the two claims conflict, we should determine whether a limited and carefully circumscribed reduction of one yields a substantial gain for the other. This should be allowed only if strong “notches” are developed to prevent sliding down a slippery slope.⁵

Accordingly, the examination turns next to assessing the scope of benefits to the common good that DNA usages provide, followed by a discussion of DNA’s contribution to the protection of individual rights, and then to an assessment of claims that DNA usages violate such rights.
Benefits for the Common Good

In its few years of operation, the British National DNA Database, which was the first national DNA database in the world, has provided over sixteen thousand links between suspects and DNA left at crime scenes. At this point, according to Britain’s Forensic Science Service, the database matches between seven and eight hundred crimes to suspects or to other crimes each week. Some would argue that this figure exaggerates the effectiveness of the database.

In the United States, where DNA databases are newer and much less developed than in Britain, the FBI’s multitiere database system, CODIS, had “assisted in over 1,100 investigations in 24 states” by March 2000. Many of the benefits of the databases have yet to be realized, because large numbers of DNA samples that have been collected have not yet been analyzed and coded and hence are not included in the databases. And DNA has yet to be collected from many convicted criminals.

Nevertheless, in the United States, as one source put it, “For a decade, DNA tests have been the most powerful tool available to police and prosecutors investigating new crimes, helping to pinpoint suspects in rape and murder cases, while alerting authorities when they were on the wrong track.” Paul Ferrara, the director of Virginia’s DNA database program, said DNA testing “is revolutionizing the way police do their work.”

In the short period in which DNA databases have been in use for forensic purposes, they have played a significant role in taking large numbers of criminals off the street. Numerous old, “cold” crimes that had long occupied the time and resources of law enforcement have now been solved. Serial killers and rapists have been much more readily identified. As tests and data banks—which currently encompass but a small number of criminals—are expanded, the benefits of DNA usage will be greatly increased.

Indeed, this has already begun to occur in those states with less stringent database inclusion criteria that have committed themselves to reducing backlog. Virginia, which with 28 percent of the national database is the largest contributor of samples to CODIS, has averaged one cold hit per day since April and was, as of July 2002, averaging two and one-half hits per day. The state’s cold-hit success rate is likely to continue to increase as a result of the January 1, 2003, expansion of its database to include all those charged with, but not yet convicted of, violent felonies; state officials predict that 1,000 to 1,500 samples will be taken each month from arrested suspects.
There seem to be no data on the deterrent effect that DNA usages have. However, it would be very surprising if, as it becomes increasingly evident to potential criminals that even one hair or drop of sweat can link them to a crime or a crime scene, this will have no deterrent effect. It is hence likely that DNA usages will lead not only to more convictions, but also to fewer crimes' being committed in the first place, which is the best of all worlds. In short, the benefits to public safety of DNA usages are very substantial.

One might argue that almost no one opposes all forensic DNA usages. However, the vastly overblown rhetoric used to associate DNA testing with eugenics policies does not discriminate among various law enforcement (or even other public) usages. In any case, a full review of the merit of such usages requires assessing the merits of proceeding with those usages. Hence the discussion up to this point.

**Advancing Individual Rights**

DNA tests and databases serve not merely to dramatically increase public safety, but also to protect individual rights. One of the strongest and indeed noblest claims of free societies is that it is better to let a thousand guilty people go free than to imprison one innocent person. This is a very powerful commitment that attests to how abhorrent a free society holds incarceration of the innocent. Extensive and accessible DNA testing and databases can be strongly justified on this ground alone: they already have freed from prison—even death row!—a substantial number of innocent people who had been falsely convicted and incarcerated. Even though it took several years for DNA testing to become admissible in U.S. courts, and even though DNA data banks are only now being set up on a large scale in the United States, a significant number of wrongly convicted people have already been freed. As of mid-2003, the Innocence Project had helped exonerate 127 convicts.15

Moreover, Barry Scheck reported in a statement before the Senate Judiciary Committee on June 13, 2000, that “[i]n 16 of [the first] 73 post-conviction exonerations [in North America], DNA testing has not only remedied a terrible miscarriage of justice, but led to the identification of the real perpetrator.”16 He correctly added that “[w]ith the expanded use of DNA databanks and the continued technological advances in DNA testing, not only will post-conviction DNA exonerations increase, but the rate at which the real perpetrators are apprehended will grow as well.”17

Not only have DNA usages resulted in numerous exonerations, but these exonerations in turn have shed light on systemic problems within the criminal justice system—problems that have themselves contributed to individual-rights violations.
In a report sponsored by the U.S. Department of Justice documenting twenty-eight cases of wrongful conviction, Edward J. Imwinkelried, professor of law at the University of California, Davis, notes that "[i]n all 28 cases, without the benefit of DNA evidence, triers of fact had to rely on eyewitness testimony, which turned out to be inaccurate." Similarly, some sixty of the first eighty-two people exonerated by the Innocence Project were convicted on the basis of eyewitness identification; more than half the cases involved police or prosecutorial misconduct, including manipulation of confessions and the withholding of key evidence from the defense. Other common problems included incompetent court-appointed defense lawyers, fraudulent scientific evidence, and false testimony from bribed inmates. DNA tests are many times more reliable than police procedures heretofore very often relied upon to make people into suspects (and convicts). If one compares using DNA tests to identify a perpetrator to using eyewitnesses and police lineups, which are notoriously unreliable, one immediately sees the double virtue of DNA testing: It vastly enhances the probability that those who are guilty will be convicted and that those who are innocent will be rapidly cleared, despite the early indications that made them into suspects. Imwinkelried thus pointedly asks, "if we impose a unique restriction on scientific testimony, on balance are the courts more likely to reach just results—or are we condemning the courts to reliance on suspect types of testimony that call into question the caliber of justice dispensed in our courts?"

Moreover, by making it possible to identify quickly the guilty person from among a group of suspects (a process to be much further accelerated as handheld, quick-response DNA tests become available), DNA usages greatly reduce the humiliation and costs entailed in being a suspect in a police investigation. (Paul Ferrara, director of the Virginia Division of Forensic Science, reports, "We typically and routinely eliminate approximately 25 percent to 30 percent of the suspects who the police have centered on in their investigation using our DNA analysis.") Picture the following situation, which is based on a real case. A rape has occurred in a hospital. Eleven people had ready access to the room in which the rape occurred over the night in question. Before DNA tests were available, the police would have quite legitimately questioned all eleven people, asking them to provide alibis, checking their records for past offenses, and interviewing their supervisors, friends, and family members. If the rapist was not identified, the case might linger for years, none of the eleven potential suspects would be cleared, and a cloud would hang over them at work and in the community despite the presumption of innocence that is guaranteed in trial court but not in the court of public opinion. In the new world..."
of rapid DNA testing, the police would ask each of the eleven to provide a sample
of saliva, or a hair, and all suspects (or all but one) would be completely cleared
almost on the spot, without any other measures having to be taken, and without
the undesirable effects of people being long suspected.

Granted, this hypothetical case makes several assumptions. It assumes that some
semen (or hair or saliva) was found at the crime scene; that it belonged to the
rapist;\textsuperscript{24} that the eleven people voluntarily provide the samples or that the police
would be granted the right to collect them involuntarily; and that the police sweep
would be limited to "true" suspects. (More about all these points later.) However,
one of these assumptions is unrealistic.

There are other ways in which DNA tests and databases greatly help to better
protect individual rights (as well as public safety). DNA databases are also helping
to exonerate not only wrongfully convicted inmates, but wrongfully dismissed
victims of crime. In Madison, Wisconsin, a legally blind woman whom investiga-
tors had originally accused of falsifying her story of rape and assault was vindicated
four years later when the semen sample from the victim matched the DNA of a state
convict who had a history of criminal sexual conduct.\textsuperscript{25} A Georgia woman endured
similar disbelief of her story of rape by knifepoint when police found no fingerprints
at the scene of the rape, no significant bruising on her body, and no signs of forced
entry into her home; a female detective who arrived at the scene told her that
falsifying a rape report is a felony. Six years later, when the Georgia Bureau of
Investigation entered DNA samples from state prisoners into its database and
cross-referenced them against the state crime scenes evidence database, the woman’s
rape was linked to Athens serial rapist John Scieszka, serving a life sentence for
raping five University of Georgia women.\textsuperscript{26} Interestingly, these stories of "victim
exonerations" reveal similar problems in the criminal justice system as do stories of
convict exonerations. The Wisconsin rape victim, for instance, claims she recanted
her story when police pressured her to do so during intense questioning, and her
federal lawsuit against Madison police detectives for mistreatment was dismissed.
In fact, the district attorney filed a charge against her of obstructing officers (later
dropped) when she recanted her original story.\textsuperscript{27}

In short, one should first note that DNA usages often can enhance both public
safety and individual rights. If one truly places a great deal of importance on the
release of innocent people from jail, what is considered righting the ultimate wrong,
and on limiting the exposure of innocent suspects to police interrogation, one should
welcome the extensive use of DNA testing on this ground alone.
Threats to Individual Rights

Having established the very considerable extent to which the common good is served by DNA tests and databases and their contributions to the protection of individual rights, the discussion turns to claims that DNA usages impinge on these rights. The question of balance hinges on whether rights are greatly harmed or, alternatively, barely affected by DNA usages.

Critics of DNA usages raise numerous objections that are intertwined and shade into each other. Although they differ regarding the specifics, critics employ the same arguments: that DNA usages violate basic rights such as the constitutional protection against unreasonable search and seizure, that they constitute a particularly gross violation of privacy, and that by adding to the rapid development of a surveillance society, they undermine the right to be left alone. Given that no critic seems to favor banning all DNA usages (for criminal justice purposes), although they often sound as if they do,28 the contested issues are what kind of evidence may be collected, from whom, what is to be done with the DNA material and analyses once available, and who may have access to these materials and analyses. In short, how can DNA testing and databases be effectively utilized without significantly offending individual rights?

The reliability of DNA tests, which was contested in court when they were less developed, is now considered so high that, as a rule, it is no longer disputed. (There have been only a handful of mismatches worldwide, and most of these resulted from mishandling of samples or laboratory errors. In Britain, there was one well-known mismatch that did not result from laboratory error. This case was readily corrected through further testing, and significantly, Britain’s tests use only six loci, whereas the United States uses thirteen loci in its testing, which makes mismatching in the United States even less likely, that is, extremely unlikely.)29

Fourth Amendment Concerns

The Fourth Amendment is not a barrier per se to DNA usages. The Fourth Amendment establishes the most communitarian of all the rights enumerated in the Constitution, because on the face of it, it recognizes the public interest. By banning unreasonable searches and seizures, it recognizes that there are reasonable ones; those in the public interest. (Compare its text to the First Amendment, which reads, in part, “Congress shall make no law,” and hence is widely recognized as more absolute than the Fourth Amendment.) However, this still leaves much room for
differences of opinion about where the point of balance between liberty and other public concerns lies, and about what makes a search reasonable or unreasonable in general, specifically in the area at hand. Civil libertarians almost invariably argue in regard to any new law enforcement technique and procedure (and about many old ones) that it constitutes an unreasonable search.

Most DNA usages raise the same objection among civil libertarians. For instance, the New York Civil Liberties Union opposes most DNA usages on the ground that they violate the Fourth Amendment. And Dorothy Nelkin and Lori Andrews recount claims by Virginia inmates whose DNA was collected for a database that “in the absence of individualised suspicion, mandatory extraction of DNA samples violated their Fourth Amendment right against search and seizure.” Opponents of DNA collections for databases, both from convicts and from other groups, point to the lack of “individualized suspicion” because this is the courts’ general standard for probable cause. (It is said to draw the line between reasonable and unreasonable searches.) However, searches lacking individualized suspicion have repeatedly been upheld by the courts if there are other good reasons for them, whether these reasons are said to fall under a “special-needs exception” or a “public-safety exception” to the Fourth Amendment. Sobriety checkpoints that stop all or randomly chosen drivers, rather than only those whose driving shows signs of their being intoxicated, have been held to be justified (and hence legal), as has the use of metal detectors in airports, public buildings, and many other places that search the belongings and persons of millions of people each day.

Moreover, the Constitution is a living document that has always been reinterpreted to take into account the changing social and historical situation. Without such recalibration, there would be no constitutional right to privacy (articulated only in the mid-1960s); the right to free speech would have a rather more limited meaning than attributed to it today; and African Americans would not count as full persons. Similarly, searches of whole categories of people, when they are not based on ascribed status such as race and gender, are permitted by a modern interpretation of the Fourth Amendment, reflecting the modern need to deal with large numbers of people and new kinds of threats to their safety.

Whatever legal argument one relies upon to justify them, the fact is that the courts have found such searches legitimate. This is in line with the communitarian conception of individual rights and the common good articulated earlier. DNA usages are, in principle, justified on the same grounds as other suspicionless searches, but the question remains: Who may legitimately be subject to them? Just as mandatory
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drug testing of one and all is not justified because there is no compelling public interest, DNA testing of all people is not justified. The question becomes, When is there a compelling public interest in conducting DNA testing of an individual, and in these cases, which, if any, of that individual's rights are violated?

Rights issues differ in their relation to three categories of people: convicted criminals (violent and nonviolent), suspects, and innocent people. There is relatively little disagreement that given the high propensity of criminals to commit additional crimes once released from prison,\(^32\) given that their DNA may help to solve crimes they committed before they were caught and convicted of the crime for which they were sentenced, and given that there is a well-established legal tradition of greatly scaling back the rights of felons even when there is much less public interest (for instance, they are not allowed to vote), collecting DNA material from them and keeping the evidence is very much in line with the American constitutional tradition. People who commit crimes surrender many of their rights, from their liberty to their privacy.

Which criminals should be included in DNA data banks? Only violent ones? Or also those who commit nonviolent crimes such as burglary and car theft? Since the early 1990s, Virginia and Florida have compared the DNA of convicted offenders, including burglars, to the DNA found at the scenes of unsolved crimes. According to one newspaper article, in state investigations, "more than half the DNA investigations of unsolved violent crimes led to burglars."\(^33\) At that time Ferrara said, "People think of burglars as these . . . 'gentlemen bandit' types, but that is often not the case."\(^34\) In Virginia, 60 percent of the crimes solved through DNA matching have been linked to convicted burglars, and about 50 percent of such crimes in Florida have been matched to burglars.\(^35\) Ferrara specifically credits his state's all-felon DNA testing law for its cold-hit success. "If our databank didn't include property crimes," he noted, "then only 15 percent of the hits we made would have been made."\(^36\)

According to an editorial in USA Today, "Research in England and the United States in recent years has shown that violent criminals such as rapists commit felonies such as burglary before they turn to violence. Collecting DNA blood samples robs police of data that have proved to be effective in solving serious crimes."\(^37\) Similarly, in the debate in Florida over a law that would include burglars in Florida's DNA database, "[t]he FDLE Department of Law Enforcement cites statistics showing a correlation between burglars and rapists. It says more than half of the state's
Collecting the DNA of burglars could lead them to current or future rapists." On the other hand, the editors of the *St. Petersburg Times* continue, "that justification applies just as easily to a host of other types of crimes. If a large percentage of rapists received speeding tickets, would that justify expanding the DNA database to include those with moving violations?"

When the communitarian principle is applied, it may, at first, seem that if a high percentage of nonviolent offenders go on to commit violent crimes, then their DNA should be collected and banked, and if the percentage is a lower number, then their DNA should not be collected and banked. If the correlation is low between nonviolent offenders and past or future violent crime, then collecting their DNA serves the public interest relatively little, whereas if it is high, the service to the public interest is considerable. But there are other considerations. Even if there is only a low correlation between a particular type of nonviolent crime and violent crime, collecting the DNA of convicted nonviolent felons may still be justified, because they have significantly lowered rights. It must therefore be determined how high a correlation is necessary to justify testing in reference to any particular kind of nonviolent crime at issue. For instance, society might deem that failing to pay child support offends its values more (or less) than embezzling and thereby decide that one category of offenders is entitled to fewer rights than another. It may then take such a ranking of nonviolent crimes into account when judging whether DNA should be collected from any particular category of offenders, which is a separate consideration from the question of how likely it is that those who committed one of these crimes will also commit a violent one.

Regarding the issue of relatives that may be pulled up during a search because they match on, say, eleven out of thirteen loci; DNA should always be used in conjunction with other types of evidence, such as eyewitness and circumstantial. Granted this means that at least for a brief moment a relative of an actual perpetrator of a particular crime will be treated de facto as a suspect in that crime merely as a result of his or her blood relationship to the actual perpetrator. But the same holds even for nonrelatives in searches based on other "evidence," such as eyewitnesses. We can hardly stop reviewing people's whereabouts or other personal information just because we are not yet sure that they are the criminal wanted in a particular crime.

Although civil libertarians strongly oppose the testing of nonviolent offenders, they are even more vehement in their opposition to testing suspects (including arrestees) and above all innocent people, even if people consent.
There is a tendency to lump together all people who have not been convicted of
a crime because of a very widely held belief that our justice system presumes people
to be innocent until proven guilty. Although this is of course true, the fact is that
suspects in free societies are treated rather differently from both innocent people
and convicted criminals. If one prefers, one can talk about innocent-innocent (or
fully innocent) people and innocent-suspects (out of respect for the norm that no
one is guilty until he or she is convicted). But such wording is not only awkward
but also conceals the fact that, whatever suspects are called, they are treated neither
as innocent people nor as convicted criminals.

To lay out my position in regard to DNA testing of arrestees and others not (yet)
convicted of a crime, it is necessary to define the term suspect. When the term is
used loosely, practically anyone can be considered a suspect in any crime, as in the
phrase “I think he did it.” This broad sense of suspect is the one used when, for
instance, people suggest, as Troy Duster did during the “DNA and the Criminal
Justice System” conference, that we must be wary of the danger that police might
treat whole populations as suspects, as is the case for African Americans when the
police engage in racial profiling.41

As I use the term here, however, it is much more narrowly defined. A suspect for
the purposes of this discussion is a person who has undergone some kind of legal
process that makes it clear that he or she is suspected of having committed a crime.
The best-known mechanism for making innocent (and guilty) people into suspects,
and the one that is relatively less contested than others, is seeking a warrant from
a judge to search a person’s home or body. (Others include arresting a person and
stopping and detaining someone who is running from a crime scene.) These mech-
anisms make people legally suspect, even if the search yields no relevant evidence
or they are eventually released from custody or acquitted at trial, as long as there
is sufficient evidence to detain or search them. (As I discuss briefly later in the
chapter, there are mechanisms that should protect people from being arrested or
detained without such evidence.)

Once a person is defined as a suspect through a legal process, his or her rights
are diminished in comparison to those of innocent people, although not as much as
are the rights of convicted felons. Suspects’ homes, cars, and persons may be legally
searched; suspects may be brought to a police station for questioning and even
arrested and held in prison for defined periods of time; and their passports may be
suspended.42 Above all, they may be fingerprinted, whether or not they consent
which is of special importance given that there are certain similarities between fin
gerprinting and DNA testing and databases, as both serve to identify a person and tie him or her to a crime. None of these measures can be legally taken against innocent people who are not under suspicion in a crime investigation.

Given that suspects have diminished rights, including much lower rights to privacy, than innocent people, and given (as I shall show) that DNA tests can be made to be minimally intrusive, there is, on the face of it, no obvious reason why suspects should not be tested and their DNA included in databases. Indeed, in several states DNA profiles that are coded for suspects from one case are run against the DNA profiles from unsolved cases to see if the suspect from the one case might have committed a different crime.

Unfortunately, in accordance with the DNA Identification Act of 1994, CODIS cannot run broad searches in which DNA profiles from suspects are compared to the bank of DNA from unresolved cases. The states that do this kind of searching can draw only on data in their own DNA data banks. (CODIS is legally allowed to conduct such broad searches only after suspects have been convicted.)

A subsidiary question is whether the results of DNA tests conducted on suspects should be kept (presuming that the suspect in question is not convicted of the crime for which he is under investigation). If a suspect is not convicted, his DNA, like other evidence in the case, should be kept in a searchable DNA data bank for a certain period of time and then expunged or sequestered (kept in a nonsearchable location) if the suspect has not had any other problems with the law. If sequestered, the evidence would no longer be available to police in their searches regarding unsolved crimes but would be available if the person were to be convicted of a new crime—for sentencing purposes, for instance.43 (Reference to evidence here includes samples and not merely profiles.)

I have already shown that DNA testing of suspects seems very much in the public interest. In short, public authorities cannot indiscriminately declare as suspects anyone they wish to test. There are relatively clear markers that protect the innocent from suspicion in criminal investigations and mechanisms to protect these markers. If these mechanisms are too weak and allow innocent people to be turned into suspects too readily, then these mechanisms should be strengthened—whether or not DNA tests are performed on suspects. But if they work properly, then there is no obvious reason to refrain from collecting DNA from suspects and storing it, at least temporarily, in data banks.

Civil libertarians are especially aghast at the thought of DNA being collected from innocent people. They not only are worried that DNA may be mandatorily collected
from all people but also hold that if people are asked by the authorities to consent
to DNA testing, their consent is likely not to be truly voluntary. Mandatory col-
lection of DNA from innocent people for law enforcement purposes, as Kaye and
Smith advocate in chapter 12, is indeed abhorrent, whether coerced or not. If DNA
is collected for a particular purpose, such as for identification of infants or military
personnel, penalties should be imposed if it is used in any other way, and the mate-
rial should be carefully safeguarded. (These matters are discussed further later in
the chapter.) To collect DNA from all people in a free society would be to treat all
members of that society as if they were suspects, if not criminals. And there would
be minimal public benefit from such a measure (which would decrease even further
as more and more criminals and suspects were included in databases). In short, the
situation of nonsuspect citizens is the opposite of the situation of criminals: full
rights and little public benefit from DNA testing versus diminished rights and high
public benefit from DNA testing. However, the police must be allowed to ask for
DNA samples from people not considered suspects, even though the submission of
DNA should not be mandatory for all citizens.

At the same time, if there is evidence that undue pressure has been applied in
obtaining it, DNA evidence—like all other evidence obtained under coercion—
should be dismissed. However, the mere fact that the police requested a DNA sample
should not be construed as undue pressure. Such requests can be essential in a whole
set of situations for effective law enforcement (including speedy clearing of suspects),
and if consent is freely given, they entail no diminution of rights.

Privacy Violation

DNA testing is said to be particularly intrusive for two reasons. First, critics argue
that blood testing is especially intrusive because it involves entering the body. It is
not simply an invasion of privacy, but an intrusion into our self-possession of our
bodies. Second, DNA testing is said to be particularly intrusive because it reveals
much more information about the person tested than does, for instance, finger,
printing. The question, then, arises, as Eric Juengst puts it, “What should societ
be allowed to learn about its citizens in the course of attempting to identify them?”

The first concern is less weighty than the second one, even if one does
with the ruling in People v. Wealer, in which the Illinois Court of Appeals
the constitutionality of an Illinois DNA data bank statute on the grounds that
testing is minimally intrusive (or with the Jones court, which cited Skinner to estab
lish that blood testing is a “not significant” intrusion).
DNA tests can be performed with a lower degree of bodily intrusion even than blood tests require. New York City, for instance, plans to base its bank on saliva taken from people at the same time they are fingerprinted. In fact, DNA can be collected not only from blood, but also from skin cells and dandruff, as well as from the cells contained in saliva, sweat, or urine or attached to strands of hair. Thus, samples other than blood can reliably be used for DNA testing, and collecting them is much less intrusive than collecting blood (or even urine, which often must be provided under supervised conditions).

The second concern, that DNA testing poses a threat to informational privacy, is less easily dealt with. In considering it, we ought to keep in mind several factors, all of which suggest that the threat to privacy is much lower than some have suggested. First, unless one simply views the government as some kind of ruthless enemy, there is no reason to believe that it will use DNA that is collected for criminal-identification purposes to find out about people's family history, illnesses, and so on. In addition, bans on such research and disclosure of such personal information have been introduced. So far there has not been a single reported violation of these restrictions. And even if a few did occur, this might lead to tightening security and raising penalties but still would not justify preventing the storage of the proper information. After all, we do not shut down other basically beneficial systems, from airline traffic to courts, because some mistakes occur. Making policy based on horror stories is a horrible idea.

Second, DNA tests that are done on blood stains, semen, saliva, and biological tissue found at crime scenes are not a violation of privacy. Courts have ruled (relying on Katz v. United States) that there is no privacy violation involved in investigative activities in places a reasonable person would have no expectation of privacy and society does not presume one exists. This makes sense. If a man walks down Main Street wearing only his birthday suit, he has little reason to complain if people see his private parts. It seems reasonable to assume that criminals who leave behind the DNA samples taken from crime scenes have no more expectation of privacy than if they leave behind fingerprints. (This holds not only for crime scenes, but for all other public places. If one leaves a document in a park confessing to one's crime, one can hardly expect that it will not be used as evidence.)

If a DNA sample is taken from a criminal or suspect under court orders, this does constitute a diminution of his privacy. But as already indicated, this intrusion can be minimized by collecting hair or saliva rather than blood and by limiting access to the test results. And to reiterate, criminals and suspects have diminished privacy
rights in general. Even for innocent people privacy has never been considered an absolute right.

Slippery Slope and Racial Discrimination

Critics employ two other arguments against DNA usages: the slippery-slope argument, and the argument that such usages pose a danger of racial and other forms of discrimination. The first argument is exemplified by a remark from a Boston public defender who, in reference to the collection of DNA from inmates, probationers, and parolees, asked rhetorically, “Why not round up poor people?” Paul E. Tracy and Vincent Morgan write:

These various scenarios follow a clear-cut progression. A sex-offender-only database seems virtually unobjectionable. The conviction-based databases seem a little more expansive, but still they do not seem particularly troubling. After all, a judge or a jury found the accused guilty. That should be enough. The arrest-based systems are the current thresholds, but here, we have no assurance of guilt, only suspicion. With the total population database, even if one takes cost out of the equation, it still seems a little too futuristic. Something about it just seems contrary to our notions of individual autonomy, and our sense of personal privacy.

Others argue that DNA tests do or will lead to racial and other forms of discrimination. Steinhardt and Duster (see chapters 9 and 14, respectively) and Peter Neufeld are among those who fear that DNA databases would lead to discrimination because studies might show that people who commit more crimes than others share some DNA markers, and hence all those with these attributes would be discriminated against.

Both arguments deserve attention, but the main question is where they take us. If the conclusion is that DNA tests and banks should not be used, these arguments must be set aside for reasons already discussed: Rather than abandoning generally useful systems when mistakes occur, we ought to work to correct them. Thus the above arguments are meant to suggest that we must carefully notch the slope, set clear markers for what is allowed and not allowed, and penalties for the abuse of genetic information; if policies governing DNA usages include adequate protections of this type, they deserve our full support. Just as no responsible person would argue that we should stop enforcing traffic laws and conducting sobriety tests merely because, in some places, racial profiling has been simply used, civil libertarians should not assert that DNA banks should be closed because they fear that one day those banks may be used to discriminate against some people.
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DNA Adds to the Surveillance Society

Another major source of the opposition to DNA usages is derived from the concern that DNA databases would significantly add to the capacity of the government to track its citizens. DNA fingerprinting is said to add to information-gathering technologies that “are rendering individuals more and more transparent, and relentlessly reducing the private spaces into which people have traditionally been able to retreat for refuge and self-definition.”55 Such surveillance technologies raise two kinds of issues. One is how to limit which investigative tools the government may use, even concerning convicted criminals. This question is the focus of my book The Limits of Privacy56 and cannot be reexamined here in a few lines. Suffice it to say that government intrusion can be justified only when there is a serious public interest, no other approaches to solve that particular public concern are possible (e.g., mobilizing the community’s norms and voice), and the intrusion is kept as minimal as possible.

The second issue regarding surveillance technologies is how to regulate their use by the private sector. It turns out that the problem with intrusive surveillance in the United States currently is not the government, the Big Brother on which civil libertarians have historically focused their attention. Instead, over the last ten years or so, almost all of the new surveillance techniques and databases, including genetic tests, have been developed by the private sector, by Big Bucks.57

Although the feared abuse of these new capabilities by the government is almost completely hypothetical—“one day, a future government might . . .”—abuses of surveillance technologies by the private sector are well documented. These include the violation of commitments not to collect information about children aged thirteen or younger without the consent of their parents58 and violations of corporations’ posted privacy policies in regard to those who frequent their Web sites.59

DNA tests and databases may at first seem to be an exception to the previously stated rule that the private sector is responsible for introducing new surveillance technologies. DNA usages, after all, have been largely introduced by the government. However, the largest force driving the use of DNA tests and databases for purposes other than criminal justice is private biotechnology firms. Here, too, fears of government abuse have concerned hypothetical futuristic scenarios, whereas this is not the case for DNA use in the private sector. So far, the main abuses of information have been by employers, who have used the results of genetic tests to eliminate job applicants from contention or to ease genetically undesirable people out of jobs. As early as 1996 a study documented 206 cases of genetic
discrimination against asymptomatic individuals. Richard Sobel and Harold J. Bursztain report that “a recent survey of employers by the American Management Association finds that 30 percent ask for genetic information about employees and 7 percent admit to using the information for hiring and promotion decisions.” And there must be additional, unreported cases of the abuse of genetic information, as people often are not told why they have not been hired, have not been promoted, or have been let go or are given vague or inaccurate explanations. Private-sector abuse of genetic information is not limited to employers. There are already reports of funeral parlor directors who have collected DNA for private purposes. Hospitals often retain blood samples taken from patients and use these samples in ways unrelated to the patients’ own care.

Confronted with the reality of the surveillance society, we can move in one of two basic directions. We can accept that new technologies, especially biometric ones (DNA tests and banks included), make a very high level of surveillance a fact of life that cannot be avoided. Indeed, several recent books have suggested that “privacy is dead.” (The head of Sun Microsystems has stated, “You already have zero privacy; get over it.”)

The other response to the expanding surveillance society is to greatly restrict surveillance capabilities, as many civil libertarians demand. In this case, though, civil libertarians must recognize that the main source of this new protection must be the government they so mistrust. New laws will have to be enacted, and the main actors that will need to be restrained will be private ones. Merely limiting the databases the government may maintain would be like curbing gun violence by prohibiting police departments from selling handguns they have confiscated—a good idea, but one that deals with a tiny fraction of the market. And merely limiting the government’s ability to use privately maintained databases would mean that these databases could be used for de facto discrimination regarding employment, credit, and housing but could not be used for law enforcement and other common-good purposes.

Currently, laws governing information gathering mainly reflect an earlier view of the surveillance society: They greatly limit what the government can legally do with the information it collects and impose penalties for government abuses. In effect, as of the summer of 2003, the only two encompassing nationwide (federal) privacy protection laws, which banned the collection of numerous kinds of information and severely limited the use of the information that has already been collected, are the privacy regulations that, in 2000, were incorporated into the Health
Portability and Accountability Act of 1996 and the Privacy Act of 1974, which applies to the federal government but not to the private sector. Some new federal regulations were introduced in 1998 concerning the protection of the privacy of children and in 2000 concerning the protection of financial records; large-scale regulation of medical privacy, including genetic privacy, is expected. But still, as of the time this book went to press, there are next to no limitations on what private companies, including labs and hospitals, can do with blood and other samples that contain DNA or what they can do with the results of DNA tests they have already conducted. And of course, anything that is so freely available in the private sector is at least potentially available to the government.

To argue that the government should be the main protector against DNA abuses is not to suggest that the government itself is not to be limited by law and scrutinized. It is like hiring guards who need to be supervised and whose scope of duties needs to be circumscribed. The government still needs to be monitored to ensure that public usages of DNA will be proper. This observation leads to the questions, What usages are proper? What should be included in databases, and who should have access to them?

What to Bank and Who Should Have Access

Civil libertarians argue that the data collected and stored in DNA databases should be greatly limited in content and that the samples themselves should be destroyed and only limited profiles (electronic records of the information needed to identify and match a person) kept. The FBI already limits the extent of the informational-privacy invasion involved in DNA profiling. The DNA markers used in CODIS were specifically selected as law enforcement identification markers because they were not directly linked to any genetic code for a medical condition.

First, keeping samples taken from materials found at crime scenes and those taken from arrestees and criminals is justified for now on the ground that DNA tests are still rapidly developing. If the samples are destroyed, any new information they may yield as better technology is developed will not be available if future criminals and suspects need it to prove their innocence, nor will it be available to the government for solving crimes. We need only recall samples that were destroyed but a few years back, when DNA tests were less accurate, and how much damage was consequently done to both individual rights and the common good. One can also readily agree with Scheck, who has proposed a duty to preserve biological evidence while an
inmate is incarcerated, noting that "[i]n 75 percent of our Innocence Project cases, where we have already determined that a DNA test would demonstrate innocence if it were favorable to the inmate, the evidence is lost or destroyed."

Someone might argue that, at this point, DNA tests are so reliable that no additional gains in information yields can be expected. However, improvements do occur, such as decreases in the amount of material one needs to extract DNA. In Arizona in 2000, Larry Youngblood was exonerated for the sodomy of a young boy, a crime for which he had been convicted almost two decades earlier. Whereas the small amount of semen that was found was insufficient for reliable testing at the time of Youngblood's trial, new testing procedures showed conclusively that the police had the wrong man. Surely additional improvements that cannot now be envisioned can be expected. Existing DNA samples should be kept for at least five more years after the trial, to see whether or not they are needed for retesting as a result of test improvements.

Second, the use of criminal justice DNA databases for nonforensic purposes (particularly an issue for physical samples, but also for digital files) should be banned, and the use of non-criminal-justice databases (e.g., medical-research databases) for forensic purposes should also be prohibited. The reasons for this position range from principled to prudential. In principle, whereas the government can justify (for the categories of persons discussed, under the conditions discussed) collecting DNA samples without consent for criminal justice purposes, it cannot justify collecting DNA for other purposes, such as producing income (hence the legitimate criticisms of certain state governments when they sold driver's license information). More difficult are those cases in which the government might make the data from forensic DNA databases available for other public purposes such as medical research and the determination of paternity (as Ohio allows). Such cases require a whole separate discussion. Such additional discussion is not, however, needed in regard to information collected for medical purposes, which should not be used for forensic purposes for many obvious reasons.

New Inmate Right

A growing number of inmates have asked to have their DNA tested to prove their innocence, sometimes repeatedly, as improved technology has become available. From their viewpoint, there is nothing to be lost. Although as of November 2002, twenty-six states permitted inmate access to postconviction testing, up
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states in 1999, many states continue to resist these requests in accordance with finality doctrines that set time limits for the introduction of new evidence after sentencing. They argue that there must be some limit, lest cases be strung along endlessly by frivolous appeals. However, given the high regard in which we as a society hold protecting innocent people, and given the considerable number of cases in which such tests have exonerated people, such a right should be provided, at least for one test per inmate. Another suggestion along the same lines is that DNA testing should be done within seven to fourteen days of a crime to help ensure that innocent suspects are not even tried, much less incarcerated.

At the same time, we should not allow inmates to turn DNA tests into a new tactic for delaying their sentences from being carried out and for imposing costs on the government by demanding test after test, arguing that the previous one has not been carried out quite properly, that it may have been misinterpreted, and so on. Under normal circumstances, one test per inmate should be the limit. Otherwise, this new right will unduly limit the ability of the criminal justice system to carry out its duties. This is far from a minor concession to inmates' interests. District attorneys have repeatedly argued that, given the limited testing facilities and resources, tests for inmates delay inputting crime scene DNA into databases and allow killers and rapists to continue to roam free.

In Conclusion

The fear that DNA tests and databases will usher in eugenics-based government policymaking is unfounded. Governments that introduce laws and policies rooted in eugenics generally violate a wide range of human rights and abolish democracy, and hence such governments must be fought whether or not there are DNA tests. In fact, such tests contribute significantly to the maintenance of conditions under which such governments are unlikely to arise.

The starting point of a communitarian approach to the issue at hand is that both rights and the common good place major moral claims on us (as the Fourth Amendment suggests), rather than that ours is a rights-centered society and that if rights are to be limited in any way the burden of proof is on the advocates of the common good.

In this context, one should note that often DNA usages serve both to protect the rights of innocent people and to enhance public safety. However, when the two do conflict, one should take into consideration the very high value of DNA for public
safety. Moreover, as we have seen, our right not to be subject to unreasonable search and seizure, our right to privacy, and our right to be generally left alone are not infringed upon (or only minimally so) by DNA tests and databases that encompass criminals and suspects. Innocent people, though, should not be tested for criminal justice purposes, unless they truly volunteer to do so. Other parties should not have access to criminal justice databases, and public authorities should not have access to DNA tests and databases produced for private purposes (such as medical and military ones), although the relationship among such databases is beyond the purview of this study.

Most important, the traditional distrust of the government by civil libertarians is misplaced in the case of DNA testing and databases, because in the contemporary United States, the main violation of rights in this area is by private corporations. In fact, the government will have to play a major role in protecting citizens from such abuses.

Notes

I am indebted to Andrew Volmert for extensive research assistance for this chapter. In revising this chapter, I benefited from extensive discussions of the issues at hand at the “DNA and the Criminal Justice System” conference, John F. Kennedy School of Government, Harvard University, Cambridge, Mass., November 19–21, 2000 (proceedings of the conference are available at www.dnapolicy.net).


2. Quoted in ibid.


7. For example, it is unclear how many convictions result that otherwise would not have.

9. About five hundred thousand convicted offender samples to be inputted into the CODIS database had yet to be analyzed as of this writing; compared to the roughly four hundred and fifty thousand that were to be analyzed for STRs by the end of 2003. National Institute of Justice, Recommendation of the National Commission on the Future of DNA Evidence; available at www.ojp.usdoj.gov/nij/dna/codisic.htm. Accessed 1/5/03.


17. Ibid.


20. As Supreme Court Justice William J. Brennan wrote in his opinion in United States v. Wade, "The vagaries of eyewitness identification are well known; the annals of criminal law are rife with instances of mistaken identification." United States v. Wade, 388 U.S. 218, 87 S. Ct. 1926, 1933 (1967). It has been widely documented that eyewitness accounts are unreliable. Gary L. Wells and Eric P. Seelau summarize findings regarding eyewitness identification: "Although there is no way to estimate the frequency of mistaken identification in actual cases, numerous analyses over several decades have consistently shown that mistaken eyewitness identification is the single largest source of wrongful convictions." Gary L. Wells and Eric P. Seelau, "Eyewitness Identification: Psychological Research and Legal Policy on Lineups," Psychology, Public Policy, and Law 1 (1995): 765. See also "Commentary by Edward J. Imwinkelried," xiii.


24. An article in *USA Today* reported numerous cases in which criminals have become DNA savvy. Some criminals have begun wearing condoms during rapes, and some have tried to fool law enforcement by planting other people’s DNA at crime scenes. Richard Willing, “Criminals Try to Outwit DNA,” *USA Today*, August 28, 2000. Great Britain also reports a rise in rapes in which the rapist attempts to establish a relationship with his future victims at bars or clubs so that any DNA evidence he leaves behind can be explained. Clare Dyer, “Rapists Target Pubs and Clubs,” *Guardian* (London), January 7, 2003.


27. Elbow, “Rape Case Resurfaces.”


34. Ibid.

35. See ibid. David Coffman of the Florida Department of Law Enforcement reported in his presentation “Developing DNA Databases” during “DNA and the Criminal Justice System,” November 20, 2000, that “52 percent of the offenders linked to sexual assaults and homicides by DNA database matches have had prior burglaries.” Transcript available at www.ksg.harvard.edu/dna/transcribe_table_page.htm.

36. Sanminiatelli, “Virginia’s DNA Database Averaging One Cold Hit a Day.” For all-felon laws, see chapter 16 of this volume.
37. "DNA Key to Fighting Crime: Privacy Fears About This Law-Enforcement Tool Are Overblown," editorial, USA Today, August 21, 2000, 16A.

38. "Balancing DNA Use," St. Petersburg Times, March 29, 2000, 14A; see also Coffman's presentation "Developing DNA Databases" at "DNA and the Criminal Justice System."

39. "Balancing DNA Use."

40. For more on low-stringency searches, see chapter 16 of this volume.

41. "Privacy/Ethics Principles in the Creation and Use of DNA Databases."

42. Note that some of these matters are covered by state laws, and hence there are some differences in these matters among states.


53. Presentations by Peter Neufeld, Barry Steinhardt, and Troy Duster, "Privacy/Ethics Principles in the Creation and Use of DNA Databases" during "DNA and the Criminal Justice System."

54. On notching, see Etzioni, The Spirit of Community, 177-191.


56. Etzioni, The Limits of Privacy.

57. Ibid., especially chaps. 4 and 5.

59. Ibid.


64. Quoted in Dominique Jackson, *The World According to ... Malcolm Crompton*, *The Australian* (Sydney), July 18, 2000, 56.


68. Scheck, statement to the Senate Committee on the Judiciary, *Post-conviction DNA Testing*.

69. Ibid.


